

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

FILED

MAY 27 2020

Clerk, U.S. District Court
District Of Montana
Missoula

GARY LEE ENZLER,

Petitioner,

vs.

**ATTORNEY GENERAL OF THE
STATE OF MONTANA,**

Respondent.

CV 20-34-H-DLC-JTJ

ORDER

United States Magistrate Judge John T. Johnston issued his Order and Findings and Recommendation in this case on April 23, 2020, recommending that the Court dismiss Enzler's Petition for Writ of Habeas Corpus, brought pursuant to 28 U.S.C. § 2254, and deny a certificate of appealability. (Doc. 4.) Enzler did not file objections, but he did move for appointment of counsel. (Doc. 5.) Because Enzler did not object, this Court reviews the Findings and Recommendations for clear error. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc); *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000) (citations omitted).

Judge Johnston recommended dismissal of Enzler's habeas petition as an unauthorized second or successive petition. The Court adopts the recommendation. As Judge Johnston pointed out, counsel was appointed to represent Enzler in his first habeas petition, which was denied on the merits. *See Enzler v. Fender*, No. CV 16-100-H-DLC-JTJ (D. Mont. Filed Oct. 26, 2016). Because the current proceeding was not authorized by the Ninth Circuit Court of Appeals, the Court lacks jurisdiction over it. And, because there is no viable argument that Enzler's petition is not an unauthorized second or successive petition, the Court adopts the recommendation to deny a certificate of appealability. 28 U.S.C. § 2253(c)(2).

The Court also denies as moot Enzler's motion for appointment of counsel. No matter how skilled, counsel would be unable to cure this Court's lack of jurisdiction over Enzler's petition.

Reviewing the remaining portions of Judge Johnston's Findings and Recommendation for clear error and finding none, IT IS ORDERED:

- (1) Judge Johnston's Findings and Recommendation (Doc. 4) is ADOPTED;
- (2) Enzler's Motion for Appointment of Counsel (Doc. 5) is DENIED;
- (3) Enzler's Petition is DISMISSED;
- (4) A certificate of appealability is DENIED; and

(5) The Clerk of Court shall enter judgment of dismissal by separate document.

DATED this 27th day of May, 2020.



Dana L. Christensen
Dana L. Christensen, District Judge
United States District Court